IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Supplee Vol. 3297

HARRY GAMBOA BUCKLEY, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	No. 19125

BRIEF OF PETITIONER HARRY GAMBOA BUCKLEY IN SUPPORT OF PETITION FOR REHEARING

After Decision by the United States Court of Appeals for the Ninth Circuit of Appeal from the United States District Court for the Southern District of California, Central Division

WILLIAM R. BERKMAN
120 Montgomery Street
San Francisco, California

Attorney for Petitioner
under appointment by the Court

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

TABLE OF STATUTES CITED

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARRY GAMBOA BUCKLEY, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	No. 19125

BRIEF OF PETITIONER HARRY GAMBOA BUCKLEY IN SUPPORT OF PETITION FOR REHEARING

I

JURISDICTIONAL STATEMENT

Petitioner Harry Gamboa Buckley (Buckley) appealed pursuant to 28 U.S.C. §§ 1291 and 1294 from a judgment of conviction in the United States District Court for the Southern District of California, Central Division, after a trial by jury on an indictment charging him with eleven counts of aiding and abetting (18 U.S.C. § 2) certain co-defendants in violations of 21 U.S.C. § 174. By decision dated April 28, 1965, this Court affirmed the conviction.

Buckley filed a Petition for Rehearing in this case on June 24, 1965 on the ground that he was denied

a fair review of his appeal by reason of inadequate preparation and prosecution of the appeal by counsel who has subsequently been dismissed. Buckley respectfully requests, in the interests of justice, that this Court rehear and reconsider this case.

II

STATUTES INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part:

> "Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 18, United States Code, Section 2, provides:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

III

STATEMENT OF FACTS

Buckley was charged as an aider and abettor with others in the knowing and unlawful receipt, concealment and facilitation of concealment and transportation of heroin (C.T. 2). The others charged as principals in these counts were Mary Delgado Ramirez, Charlotte Orozco Vasquez, Virginia Garcia Rivas and Juliano Lopez Molano.

The evidence adduced at the trial relating to Buckley has been summarized in the Government's brief:

> "(a) During April or May 1963, Buckley met with Rudolph Esquivel and had a conversation with 'Rudy' regarding having a girl contact Esquivel to take care of him concerning a supply of heroin;
>
> (b) Buckley took Esquivel's phone number and told Esquivel he would have some girl call him later on who would take care of him;
>
> (c) A subsequent meeting took place between Buckley and Esquivel at the Coral Room, whereat Buckley was disturbed by Esquivel's tardiness, and following which Buckley escorted Esquivel around the corner to a laundromat where he introduced him to appellant Mary Ramirez, she being identified by Buckley as the person who he would see from then on and who would 'take care of him';
>
> (d) Immediately following Buckley's departure from the laundromat, leaving Esquivel and Ramirez together, an unknown male entered the laundromat and delivered a quantity of heroin to Esquivel;
>
> (e) Ramirez then asked Esquivel when she should call him and he told her in five days;
>
> (f) Esquivel had given his phone number to Buckley for future contact, and not to Ramirez; yet five or six days after the laundromat introduction,

Ramirez telephoned Esquivel regarding his purchasing heroin;

(g) On the night of July 3, 1963, just prior to the first transaction charged in Counts One and Two of the Indictment which occurred the following day, Buckley met with Ramirez and an unidentified male Mexican, outside of Ramirez' mother's house, and engaged in conversation for approximately thirty minutes;

(h) During the early part of July, 1963, Buckley, at Ramirez telephonic request, provided Virginia Garcia with a ride, whereafter Ramirez admonished Garcia regarding Buckley, 'don't ever mention his name in front of nobody';

(i) Appellant Ramirez, when discussing the inferior qualities of the heroin she had been providing for Esquivel told him, 'We keep it in separate places. I can't understand why it got messed up. . . . We have it packaged the same way; we get it from down below.'; (Emphasis added.)

(j) Buckley was described as a man who 'is pretty hard to find';

(k) Buckley had been at appellant Vasquez' house at least on one or two occasions:

(l) Following Buckley's arrest he told his female companion 'to watch everything carefully because . . . (the agents) may try to plant him'; lost his 'cocky' attitude when confronted with a $20 bill which had been in his possession and which matched the serial numbers on the bills given to Mary Ramirez by Esquivel in the July 6 heroin transaction; and told Deputy Velasquez to release his female companion saying, 'This is the first time I have been down below and did conduct any business. . . . She doesn't know anything about it. You ought to let her go'; (Emphasis added.)

(m) Buckley denied to the officers knowing Ramirez, Vasquez or Virginia Garcia." (Appellee's Brief pp. 30-32.)

In his testimony Buckley denied giving or furnishing any person heroin (R.T. 537-38).

Upon conclusion of the Government's case Buckley unsuccessfully moved for a judgment of acquittal on the grounds of insufficiency of the evidence (R.T. 495-497). The same motion was unsuccessful at the close of the case (R.T. 564).

The Trial Court instructed the jury, among other things, that an essential element in proving the offenses charged, included "knowledge of the accused that the narcotic drug had been imported into the United States of America, contrary to law, as charged" (R.T. 685, 686).

The jury found Buckley guilty on all eleven counts (R.T. 700). His motions for judgment of acquittal and/or for a new trial were denied (R.T. 703-704). Buckley was subsequently sentenced to ten years imprisonment on each of the eleven counts, the sentences to run concurrently (C.T. 22).

IV

SPECIFICATION OF ERRORS

1. There was no competent evidence to sustain the judgment of conviction.

2. The indictment was defective and did not state an offense.

Buckley's brief on appeal raised but inadequately presented the first error specified above. The second error specified above was not presented to the Court in the brief on appeal. It is submitted that the error should be considered by the Court.

V

SUMMARY OF ARGUMENT

The evidence was insufficient to sustain the conviction of Buckley. Knowledge by Buckley that the heroin had been illegally imported was an essential element of the offenses charged. That element was not established.

The indictment alleging violations of 21 U.S.C. § 174 by other defendants and violations of 18 U.S.C. § 2 by Buckley as an "aider and abettor" of the § 174 violations was defective as to Buckley by failing to allege, in addition, that Buckley had the requisite knowledge of the illegal importation of the narcotic drug which is an essential element in stating an offense.

VI

ARGUMENT

A. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF BUCKLEY BECAUSE IT WAS NOT ESTABLISHED THAT HE HAD KNOWLEDGE THAT THE NARCOTICS WERE ILLEGALLY IMPORTED.

Knowledge of illegal importation of narcotic drugs is an essential element of the offense of aiding and abetting a violation of 21 U.S.C. § 174.

> "[K]nowledge [of illegal importation of narcotic drugs] or possession (actual or constructive) must be shown as to an aider and abettor."
>
> Hernandez v. United States, 300 F.2d 114, 123 (9th Cir. 1962).

"[I]f a certain knowledge or intent is required to be proven in order to convict one of violating a federal criminal statute, the proof to convict one as an aider and abettor will not be different from that necessary to convict the violator, except that aiding, abetting, commanding, inducing, or procuring the commission of the crime must be proven rather than actual commission."

United States v. Jones, 308 F.2d 26, 31-32 (2nd Cir. 1962) (In Banc).

"Since an aider and abettor must have the same knowledge and intent required of the principal, however, proof of knowledge of illegal importation is also necessary to a conviction for aiding and abetting. . . .

Thus a person who facilitates, aids or abets, or conspires in violation of 21 U.S.C. § 174, and who can be shown to have had possession of the drug, can be convicted without independent proof of knowledge of illegal importation."

United States v. Hernandez, 290 F.2d 86, 89 (2nd Cir. 1961).

There is no evidence in the record regarding actual knowledge by Buckley of the illegal importation of the narcotics nor did the Government attempt to prove actual knowledge. Rather, the Government contended Buckley had constructive possession of narcotic drugs and relied upon the statutory presumption contained in 21 U.S.C. § 174:

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." (21 U.S.C. § 174.)

But even assuming the evidence against Buckley is viewed in a light most favorable to the Government (see pp. 3-4 supra), as a matter of law constructive

possession was not established. This evidence at most merely shows that Buckley introduced a purchaser of narcotics to a seller and subsequently obtained a $20 bill which had been part of the $525 used to purchase the narcotics. The evidence is not sufficient for a finding that Buckley had constructive possession of narcotics. It is insufficient as a matter at law.

> "Constructive possession is a legal conclusion, derived from factual evidence, that one not having physical possession of a thing in fact nevertheless has possession of that thing in legal contemplation." [Emphasis added.]
>
> United States v. Jones, 308 F.2d 26, 30-31 (2nd Cir. 1962) (In Banc).

Constructive possession for purposes of section 174 has been variously defined as "power to control" (Hernandez v. United States, 300 F.2d 114, 117 (9th Cir. 1962)); "control or dominion" (United States v. Mills, 293 F.2d 609, 611 (3rd Cir. 1961)); "dominion and control" (Rodella v. United States, 286 F.2d 306, 312 (9th Cir. 1960)); (Cellino v. United States, 276 F.2d 941, 946 (9th Cir. 1960)); and "power to control disposition" of narcotics and ability "to assure their production" (United States v. Jones, 308 F.2d 26, 30 (2nd Cir. 1962) (In Banc)).

The way to test the facts in this case is to compare them with factual situations where the requisite constructive possession was or was not established. Such a comparison leads to the inevitable conclusion that Buckley was not in constructive possession of the narcotics.

The following cases were concerned with evidence remarkably similar to that in the instant case wherein it was held that constructive possession had not been established:

1. In United States v. Jones, 308 F.2d 26 (2nd Cir. 1962) (In Banc), the defendant had been approached by an undercover agent who wanted to purchase narcotics. Defendant introduced him to a seller and told the agent the price after a conversation with the seller. The seller delivered the narcotics to the agent in the presence of the defendant and defendant received money from the agent. The court reversed on the grounds that constructive possession had not been established in the absence of the type of proof showing that defendant set the price, had the final say as to means of delivery or was able to assure delivery. That type of proof is also lacking in the instant case. There is no evidence that Buckley did any negotiating, set any price or had any say as to means of delivery. Indeed, the first delivery was not by Ramirez, the person to whom Buckley introduced Esquivel, but by an unknown third person. There is no evidence of any contact between Buckley and Esquivel after the first conversation and the introduction to Ramirez.

2. In Williams v. United States, 290 F.2d 451 (9th Cir. 1961), a conviction was reversed when the appellate court determined that constructive possession had

not been established on evidence that defendant had been paid by the informer and narcotics were discovered near the premises where the defendant was employed.

3. Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962) reversed a conviction on the grounds that evidence that the defendant arranged a sale of narcotics to a Government agent, but was not present when the sale was made, was insufficient to establish defendant's constructive possession of narcotics.

The cases where constructive possession has been found are equally illuminating for they indicate the kind of evidence which is necessary for such a finding and which does not exist in the instant case:

1. In Cellino v. United States, 276 F.2d 941 (9th Cir. 1960), there was evidence that the defendant took the purchasers to the seller, assured the purchasers of the sale and was present when the sale was made. One court has characterized the Cellino decision as "the most tenuous inference of possession which any appellate court has sanctioned." United States v. Mills, 293 F.2d 609, 611 (3rd Cir. 1961). In the instant case the inference must be even more tenuous.

2. In Enriquez v. United States, 338 F.2d 165 (9th Cir. 1964), the defendant promised and obtained a sample of narcotics before the sale, negotiated arrangements, took an active part in the transaction, received

full payment from the purchaser, and assured purchaser of a future supply.

3. In United States v. Ramis, 315 F.2d 437 (2nd Cir. 1963), defendant was a frequent dealer in narcotics who negotiated the sale and price, stated the amounts he would deal in, defended the quality of the narcotics, accompanied the purchaser to place of delivery, and upon completion of the transaction asked the purchasers if they would do business again.

4. In Lucero v. United States, 311 F.2d 457 (10th Cir. 1962), the evidence showed that the defendant was the moving party of the sale transaction, vouched for the quality of the narcotics, set the price, arranged the delivery, and was able to assure the delivery.

5. In United States v. Carter, 320 F.2d 1 (2nd Cir. 1963), the defendant negotiated the sale, set the price, received the payment, arranged for and advised purchaser of place and time of delivery, and assured purchaser of quality and weight of delivery.

6. In United States v. Douglas, 319 F.2d 526 (2nd Cir. 1963), the defendant quoted prices to the purchaser, set the purchase price, accepted full payment, and brought about delivery.

7. In United States v. Manna, 353 F.2d 191 (2nd Cir. 1965), the evidence established defendant's control of the narcotics by bringing about sales that would

not have been made without his participation. The sales were made reluctantly and only because of the defendant's requests.

The kind of evidence which sustains findings of constructive possession does not exist in the instant case. Accordingly, it is submitted that as a matter of law, Buckley cannot be deemed to have been in constructive possession of narcotics. Since there is no evidence in the record of actual knowledge of the illegal importation of the narcotics in question, the essential elements of the offense have not been established and his conviction must be reversed.

B. THE INDICTMENT AGAINST BUCKLEY ALLEGING VIOLATIONS OF 18 U.S.C. § 2 WAS DEFECTIVE IN THAT IT OMITTED AN ELEMENT OF THE OFFENSE BY FAILING TO ALLEGE THAT BUCKLEY KNEW THE NARCOTICS WERE ILLEGALLY IMPORTED.

The indictment alleges eleven violations by the other defendants of 21 U.S.C. § 174 and alleges eleven violations by Buckley of 18 U.S.C. § 2 as an "aider and abettor" of the § 174 violations.

The counts in the indictment generally take the following form: "On or about [dates], in Los Angeles County, within the Central Division of the Southern District of California, defendants [named], knowingly and unlawfully received, concealed [or sold] and facilitated the concealment and transportation [or sale] of [quantity] of heroin, a narcotic drug, which as the defendants then and there

well knew, previously had been imported into the United States of America, contrary to United States Code, Title 21, Section 173. At said time and place Harry Gamboa Buckley aided, abetted, concealed, induced and procured the commission of the offense charged or alleged above." (See R.T. 680-85.)

The indictment as to Buckley was defective for failing to allege that Buckley had the requisite knowledge that the narcotic drug had been illegally imported into the United States. Buckley was not charged in the indictment with the substantive offense of violating 21 U.S.C. § 174. Only the other defendants were alleged to have had knowledge that the narcotic drug in question had been imported illegally. Such knowledge by Buckley was an essential element of the offense of aiding and abetting.

> "Since an aider and abettor must have the same knowledge and intent required of the principal, however, proof of knowledge of illegal importation is also necessary to a conviction for aiding and abetting."
>
> United States v. Hernandez, 290 F.2d 86, 89 (2nd Cir. 1961).

But the indictment did not allege that Buckley had such knowledge. Therefore, the indictment was fatally defective and did not state an offense with regard to Buckley.

See Robinson v. United States, 263 F.2d 911 (10th Cir. 1959) (Indictment charging an offense under 21 U.S.C. § 174 fails to state an offense if it fails to allege that the accused knew the narcotics were illegally imported.);

United States v. Calhoun,
257 F.2d 673 (7th Cir. 1958)
(Indictment charging a conspiracy to violate 21 U.S.C. § 174 was defective in failing to allege an element of offense, to wit, that accused knew the narcotics were illegally imported.).

VII

CONCLUSION

On the basis of the foregoing, it is submitted that the Court must grant a rehearing, reconsider the appeal of Buckley and reverse the judgment of conviction.

Dated: September 20, 1966

Respectfully submitted,

William R. Berkman
Attorney for Petitioner
Harry Gamboa Buckley
under appointment by
the Court

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARRY GAMBOA BUCKLEY, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	No. 19125

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William L. Berkman

Attorney for Petitioner
Harry Gamboa Buckley
under appointment by the Court

AFFIDAVIT OF SERVICE BY MAIL (C. C. P. 1013A)

(Must be attached to original or a true copy of paper served)

OF CALIFORNIA
ND
OF SAN FRANCISCO } ss.

NO. 19125

WILLIAM R. BERKMAN, being sworn, says that he is a

the United States, over 18 years of age ~~xxxxxxxxxxxx~~ ~~xxxxx~~

party to the within action.

nt's ~~xxxxxxxx~~ (business) address is 120 Montgomery Street, San Francisco, California

three (3) copies of
nt served ~~xx~~/ ~~xxxxx~~ the attached Brief of Petitioner, HARRY GAMBOA BUCKLEY, in
ort of Petition for Rehearing.
g said copy(s) in an envelope addressed to Manuel Real, Esquire, United States Attorney

ce ~~(xxxxxxxx)~~ address 600 Federal Building

Los Angeles, California 90012

velope was then sealed and postage fully prepaid thereon, and thereafter was on September 20,

deposited in the United States mail at San Francisco, California

e is delivery service by United States mail at the place so addressed, or regular communication by United States mail

he place of mailing and the place so addressed.

and sworn to before me on September 20, 1966

ALICE C. MORSE

Public in and for said county and state.

William R. Berkman

ived copy of the within ____ this ____ day of ____ 19____

Attorney ____ for ____

RINTING SUPPLY CO. 518 MARKET STREET SAN FRANCISCO

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PACIFIC COAST EUROPEAN CONFERENCE and its Member Lines, Petitioners, v. FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	No. 19,241

PETITION FOR REHEARING

Pursuant to Rule 23 of the Court's Rules, petitioners herewith respectfully petition for rehearing of the decision herein, filed April 7, 1966, on the ground that the Court did not in any fashion resolve the fundamental and far-reaching questions which were put to it.

During the course of the oral argument, the writer of the Court's opinion himself acknowledged that the administrative order in question was unique and distinguishable from all orders theretofore judicially considered. Yet the Court's opinion now sustains the order solely on the basis of these highly distinguishable cases, without any legal reasoning to bridge the gap.

The Court's apparently conclusive reliance on t. Regis* is demonstrably erroneous. Not cited or argued o the Court, by either side, it is no support for the order nvolved here. What we contested was the use of a "reporting" rder as a subpoena within the context of a formal, quasi-udicial proceeding. What St. Regis involved was the use f a similar reporting order prior to the issuance of a omplaint. See 285 F.2d at 609, and again at 612; see also he district court's decision, 181 F.Supp. 862, at 865. hus the order there concerned was no different from the any other pre-complaint investigations involved in the emaining cases cited in the Court's brief opinion. It is o authority for the present, in-hearing order.

The sustaining of this order breaks open an entirely ew and vast arena of permissible agency investigative activity, ot just limited to this one Commission but equally applicable cross the board of administrative process. The step, even f ultimately to be taken, should be made only in a reasoned onsideration of its myriad implications -- not, as here, in mere eliance upon earlier cases, none of which provides a precedent.

This Court was squarely faced with an issue of ndoubted first impression. No court, insofar as we can find, as ever considered it, and here it was the sole, focused issue --

* United States v. St. Regis Paper Co., 285 F.2d 607, 611 (2d Cir. 1960), affirmed, 368 U.S. 208 (1961).

the only matter the Court was asked to consider and decide. The decision of the Court, however, simply ignores both the issue and the argument, treating as decisive what was presented as merely the starting-point.

The Court's summary, one-sentence rejection of the applicability of A.P.A. §3(a) equally relies, without elaboration, upon an inapplicable "precedent." The only citation (and there is no discussion) is to a reference in another case to A.P.A. §6(a). We did not argue §6(a); we argued §3(a). And as our brief pointed out at length, they are totally different provisions. Again, the Court has decided a question of great importance in a mere footnote fashion.

The decision of which reconsideration is here sought is appallingly bad law. A per curiam affirmance, which made no pretensions of rationalizing its conclusion, would in the orderly development of the legal process have been far superior. The instant decision, on the other hand, creates even more bad law than it sustains.

The grossly unfair effect of the decision is to authorize administrative agencies to subpoena documents and call for reports in their formal adjudicatory proceedings. Since penalties apply immediately to non-compliance with the reporting requirements, the individual will lose his right

to test the relevancy of every such order for production, a right guaranteed by the due process clause itself. Orders to report prior to adjudication and orders to produce at a hearing are separately provided for in the statute, viz., Sections 21 and 27, and that separation should be preserved. The decision of this Court destroys it.

For its massive implications on the whole of the administrative process, if not simply to afford petitioners a meaningful judicial review, rehearing should be granted, so that the Court may consider the arguments presented.

Respectfully submitted,

GRAHAM JAMES & ROLPH
Leonard G. James
F. Conger Fawcett

By F. Conger Fawcett
F. Conger Fawcett

Dated: April 26, 1966.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by delivering by hand or by mailing via first class mail or air mail, postage prepaid, a copy to each such party or its attorney.

Dated at San Francisco, California, this 21st day of April, 1966.

F. Conger Fawcett